IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,

—against—

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73",
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY TO SUPPLEMENTAL BRIEF OF RESPONDENT ON REHEARING.

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Notwithstanding this is an action on a contract entered into in this country, and to be performed here, and is therefore clearly governed by the several decisions of this Court cited in our earlier briefs, the respondent, in its supplemental brief just filed, resorts to, and puts its principal emphasis on, a decision of an English Court based on very different facts, viz., *Imperial Smelting Corporation, Ltd.* v. *Constantine S. S. Line, Ltd.*, 46 Commercial Cases 258, 70 Lloyd's List Reports, 1 (H. of L.). That case involved the failure

of a shipowner to deliver a ship to a charterer to load cargo pursuant to a contract of charter party. Suit was brought by the charterer against the shipowner for breach of "the charter party by failing to load a cargo" (46 Com. Cas. at p. 259). The shipowner admitted that it was in default as alleged but set up as a defense frustration, or supervening impossibility of performance, and *proved* that an explosion had occurred which caused the sinking and destruction of the vessel before delivery was due under the contract.

The question presented in the case was thus stated:

> "The question here is how the onus of proof lies; that is, whether, when a supervening event has been proved which would, apart from the defendant's 'default' put an end to the contract, and when at the end of the case no inference of default' exists and the evidence is equally consistent with either view, the defense fails because the defendant has not established affirmatively that the supervening event was not due to his default" (46 Com. Cas. at p. 262).

This passage clearly shows the difference between the question under discussion by the House of Lords in the *Imperial Smelting Company* case and the question involved here. Here no "supervening event has been proved" by respondent, hence the *prima facie* case made out by the sinking of the barge in calm water, without external contact, explosion, or other explanation, remains undisturbed. In the *Imperial Smelting Company* case, the shipowner established as a fact that the cause of the sinking of the vessel there involved was an explosion. In the present case the respondent shipowner has failed to establish any fact

or event (other than unseaworthiness) which might be the cause of the sinking of its barge. It introduced evidence to show that overloading was the cause, but, as we have shown at page 16 of our reply brief, overloading itself constitutes unseaworthiness, and the District Court has found expressly that respondent's evidence as to the event (alleged overloading due to supposed negligence of the mate) which the respondent contended to be the cause, was not only insufficient to establish that cause, but was also insufficient to establish that there was overloading or that the mate was negligent. The finding of the District Court (Conclusion 1, R. 280) was that the tank barge sank at her dock in New York Harbor, in calm water, without explanation of any kind and without any external contact. This was adequate proof, under well settled law (see our Main Brief, pp. 12-15), to establish that the vessel sank from unseaworthiness. The respondent shipowner has wholly failed to show that the vessel suffered from any explosion or encountered any peril, or any external contact which might have been a possible cause for the sinking. If in the *Imperial Smelting Company* case the shipowner had been unable to establish the fact of an explosion, or to produce any substantial evidence to show why he failed to load the charterer's cargo, the judgments filed in that case show that the decision would have been the other way. Therefore, the case, if it be regarded as in any way applicable, is authority for petitioner rather than for respondent.

Respondent evidently realizes that this is so because, at page 4 of its Supplemental Brief, it challenges the long-settled doctrine that the sinking of a vessel in calm water, without explanation, makes out a *prima facie* case of loss from unseaworthiness. In none of the cases cited at page 4 of the Respondent's Supple-

mental Brief did the vessel involved sink in calm water, without any external contact. All of the cases cited by respondent deal with either (1) a situation where nothing is known concerning a vessel after she has sailed in a seaworthy condition, except that she has never been heard from after sailing, or (2) a situation where a vessel has been lost in a war zone, known to be infested with submarines, or in a known mine field. None of them deal with a case similar to that at bar, where the circumstance is known that the vessel has sunk at her dock in a harbor, in calm water, and where it is known that there was no external contact of any kind to account for the sinking.

The difficulty with the principle stated by respondent at page 5 of its brief, is that the respondent neglects to say that sinking of a vessel in calm weather, in a harbor, without any explanation, or proof of any external contact, constitutes adequate proof of unseaworthiness; and also that respondent neglects to say that the mere offering by a shipowner of testimony, which a Court finds to be unreliable, speculative and unsubstantial, is insufficient to overcome the previous adequate proof of unseaworthiness. To overcome such proof, it is necessary to offer substantial evidence (303 U. S. at p. 176).

In *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* [1901], A. C. 362, referred to in the passage quoted from Lord Wright at page 3 of respondent's supplemental brief, the House of Lords recognized that where a vessel sinks without encountering any storm, or other known cause sufficient to account for the catastrophe, a case of unseaworthiness is made out. There Lord Lindley said:

> "The underwriters have the great advantage of the undoubted fact that the vessel capsized and

> sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known, they would be entitled to succeed in the action. If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a Court ought to act upon if unassisted by a jury" ([1901] A. C. 363, at p. 366).

In the *Ajum Goolam Hosseu* case, however, it was definitely proved that that vessel had been carefully examined by both public officials and by the master, and she had been found to be in all respects seaworthy at the time of sailing. It was further proved by the shipowner that after the vessel sailed, and during "a fresh breeze and a confused sea" ([1901] A. C. at p. 368) the vessel acquired a list; that at 9:30 P. M. the captain went to bed; that the "great increase of the list * * * took place after 10:30 P. M."; that, if this list "had been reported to the captain" it could "have been remedied", but that at the time that it was reported to the captain, viz., shortly after 4 A. M., "it was too late to right the ship" ([1901] A. C. 369). In support of its judgment the Court cited *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, as holding "that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board" ([1901] A. C. at p. 371). Thus there was definite proof that after sailing there was an act of mismanagement of the ship by the officer on watch which was sufficient to account for the sinking. In the present case all attempts of

the respondent to establish any act of mismanagement failed. The District Court expressly rejected the respondent's evidence as to supposed mismanagement, and held that the respondent's testimony was too speculative, unsubstantial and unreliable to permit him to make any finding that mismanagement existed or that it could have caused the sinking.

It is noteworthy that this Court in *The Silvia*, 171 U. S. 462, at 465, cited *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72 with approval. In *The Silvia* this Court held that where the port holes on a steamer had shutters which "would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing" (171 U. S. at p. 465) if the ship has sailed with the shutters open. The reason for the rule is that such condition could be easily remedied by the crew at sea after sailing. The *Ajum Goolam Hossen* case merely decided the same point. In the present case, however, respondent's efforts to establish similar facts completely failed, in the Imperial Smelting case

Lord Russell expressed the same thought in the following language:

> "Whether the doctrine is applicable in favour of a contractor who is sued on the contract will depend in each case on the ultimate result of the whole evidence, the position of the parties as regards burden of proof varying from time to time as indicated by Bowen L. J. in *Abrath* v. *North Eastern Railway Company* [1183—11 Q. B. D. 440] (at p. 456). The defendant will prove the destruction of the *corpus*, and (where possible)

the event which brought it about. *It may be that the event is of such a nature as of itself to raise a prima facie case of fault or default in the defendant. Unless he displaces that prima facie case, he will be unable to rely on the doctrine.* The frustration will stand as self-induced. On the other hand it may be that nothing is known as to what event brought about the destruction or the known event may be of such a nature as of itself to raise no *prima facie* case of fault or default in the defendant. If the matter rests there he will be excused from liability under the contract." (46 Com. Cas. at p. 277—Italics ours.)

Similarly, Lord Wright in his judgment in the *Imperial Smelting Company* case said:

"In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively." (46 Com. Cas. at p. 289.)

The District Court has found that the respondent has wholly failed to establish that any negligence (*i. e.*, mismanagement) has been established which would over-ride the *prima facie* case of unseaworthiness. Hence, in the present case the respondent has not displaced petitioner's *prima facie* case.

In *Pendleton* v. *Benner Line*, 246 U. S. 353, at page 354, fully discussed in our principal brief, at pages 17 and 18, this Court clearly approved the statement of the Circuit Court of Appeals that the sinking of a vessel during weather insufficient to affect a seaworthy ship, is adequate proof that the sinking resulted from unseaworthiness. In *The Jungshoved*, 290 F. 733, certiorari denied, 263 U. S. 707, the Cir-

cuit Court of Appeals for the Second Circuit, Judge Hough, stated the doctrine as follows:

> "It follows that the fact stands uncontradicted that the 'Crown' was tendered as suitable to carry the load for which her size fitted her, and under less than that load, in smooth water and calm weather, she sank; in the picturesque phrase of the water front, 'she just faded away' without explanation, then or since. This raises a presumption of unseaworthiness (*Dupont* v. *Vance*, 19 How. 162*, 15 L. Ed. 584; *The Kathryn B. Guinan*, 176 Fed. 301, 99 C. C. A. 639), which, though rebuttable, has not been met. Therefore the lighter and her owner are liable and may be held for damages if properly sued" (290 F. 734, 735).

We know of no case where the rule as stated in *Pendleton* v. *Benner Line* and in *The Jungshoved* has not been applied on facts such as those here, and it is significant that respondent is unable to cite any such case. Since the sinking was of such a nature as of itself to raise a *prima facie* case of loss from unseaworthiness, and since the respondent has been unable to displace that *prima facie* case by showing any event or peril, such as explosion, external contact, or other overwhelming force, the case should be decided on that *prima facie* case. That is the doctrine of this Court in *Del Vecchio* v. *Bowers*, 296

* The circumstance that the citation of *Dupont* v. *Vance*, 19 How. 162, by Judge Hough in *The Jungshoved*, is a mistake and should have been *Work* v. *Leathers*, 97 U. S. 379, is unimportant. Judge Learned Hand says in the present case (R. 295) that the mistake arose because of misplaced quotation marks in *Oregon Round Lumber Co.* v. *Portland, &c. S. S. Co.*, 162 Fed. 912, 921. This is quite true, but we submit that the mistake is unimportant. It merely requires us to look to *Work* v. *Leathers* for authority rather than to *Dupont* v. *Vance*.

U. S. 280 and in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, especially where the trier of the facts has found that the respondent's evidence offered to displace the *prima facie* case, is unsubstantial and insufficient to support a finding in its favor.

This is a very simple case. The essential facts are settled by the District Court's findings. A steel vessel sank while alongside a dock in New York Harbor during calm weather and sea conditions and without external contact with any vessel or object, and without any explanation whatever excepting unseaworthiness or inability to keep water out of her. The respondent shipowner endeavored to show that the mate had negligently overloaded the vessel and caused her to sink, but the District Court rejected this evidence entirely on the ground that it was too unsubstantial to show either that the mate had been negligent, or that the vessel had been overloaded, or that the overloading suggested caused the vessel to sink (Finding 28, R. 273). The vessel on being raised was found to have a very large number of defective and leaky rivets throughout the vessel (R., p. 118) (according to petitioner 1500—R., p. 193, and admittedly according to respondent 500—R., p. 118), and the afterpeak tank, which had been empty (R. 62), and which had water-tight hatch covers secured in place at all times (R. 272 and 64), was found, on the vessel being raised, to be half full of sea water (R. 115).

Respectfully submitted.

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